

No. 17417 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE OLIVER BUTLER and JAMES G. SCRIBNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

OCT 31 1962

FRANK H. SCHMID, CLERK

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

Appellants Eugene Oliver Butler and James G. Scribner were indicted on January 11, 1961, for violation of Title 18 United States Code, Section 152 and both appellants were convicted on May 1, 1961. The jurisdiction of the District Court is predicated on Title 18, United States Code, Section 3231.

A timely notice of appeal was filed for both appellants on May 8, 1961.

This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II.

Statement of the Case.

An indictment in five counts, each charging a violation of Title 18, United States Code, Section 152, was returned by the grand jury on January 11, 1961, essentially charging as follows [C. T. 2 to 5]:¹

Count One: Commencing on or about July 1, 1959, and continuing to on or about September 25, 1960, defendant Eugene Oliver Butler, an officer of the San Fernando Valley Wholesale Food Distributors, Inc., a California corporation, in contemplation of a bankruptcy proceeding against said San Fernando Valley Wholesale Food Distributors, Inc. knowingly and fraudulently transferred property of said San Fernando Valley Wholesale Food Distributors, Inc. in excess of \$8,000.

Count Two: On or about September 28, 1959, Eugene Oliver Butler knowingly and fraudulently concealed from George Gardner, receiver in the estate of San Fernando Valley Wholesale Food Distributors, Inc., in proceeding No. 102397 in United States District Court for the Southern District of California, \$8,000, property belonging to the estate of the bankrupt in said proceedings.

Count Three: On or about September 28, 1959, Eugene Oliver Butler made a false account in, and in relation to the bankruptcy proceeding of San Fernando Valley Wholesale Food Distributors, Inc., being case No. 102397 in the United States District Court for the Southern District of California, in that the schedule of assets and liabilities filed in said proceedings by

¹C.T. refers to Clerk's Transcript of Record.

said defendant understate the assets of said bankrupt by \$8,000 as defendant then and there well knew.

Count Four: Commencing on or about September 8, 1959 and continuing to on or about September 25, 1960, James G. Scribner, an agent of the San Fernando Valley Wholesale Food Distributors, Inc., a California corporation, in contemplation of bankruptcy proceedings of said bankrupt, knowingly and fraudulently transferred property of said bankrupt in excess of \$6,000.

Count Five: On or about September 30, 1959, defendant James G. Scribner knowingly and fraudulently concealed from George Gardner, receiver in the estate of San Fernando Valley Wholesale Food Distributors, Inc., in proceeding No. 102397 in the United States District Court for the Southern District of California, \$6,700, property belonging to the estate of the bankrupt in said proceedings.

Defendant Eugene Oliver Butler entered a plea of not guilty to Counts One, Two and Three, the 3 counts in which he was named, and James G. Scribner entered a plea of not guilty to Counts Four and Five, the two counts in which he was named on March 6, 1961, before the Honorable Harry C. Westover [C. T. 25].

On April 25, 1961, on the motion of the Government the Honorable Wm. C. Mathes, United States District Judge, ordered Count Three of the Indictment dismissed.

On April 25, 1961, at 9:40 A.M. jury trial was commenced. The trial of this case lasted for a period of five days. The first day of trial commenced at 9:40 A.M. The luncheon recess was from 11:50 A.M. to 2:05 P.M. The afternoon session continued to 5:50

P.M., with a 15 minute recess. [C. T. 77]. Trial continued on April 16, 1961, at 9:30 A.M., with a half hour recess in the morning. The court afforded approximately one and one half hours for a luncheon recess and trial continued to 6:45 P.M., with two one-half hour recesses in the afternoon. [C. T. 79.] On April 27, 1961, the trial continued at 9:15 A.M. with a two one-half hour recesses in the morning. The court afforded approximately one and a half hour luncheon recess. In the afternoon session the court afforded two recesses of one-half hour duration each. The dinner recess was comprised of two hours and fifteen minutes with the trial day continuing to 10:05 P.M. There was an additional recess of one half hour during the evening session of April 27, 1961. [C. T. 98.] On April 28, 1961, the trial was continued from 1:15 P.M. to 5:25 P.M. with a recess in the afternoon, and on May 1, 1961, at 9:08 A.M., the court began jury instructions. [C. T. 104.]

On May 1, 1961, the jury returned a verdict of guilty as to appellant Butler on Counts One and Two and guilty as to appellant Scribner on Counts Four and Five.

On May 1, 1961, the appellants were sentenced each to a period of four years on each count to run concurrently. [C. T. 108.]

On May 8, 1961, the appellants filed a timely notice of appeal. [C. T. 109.]

III.

Statute Involved.

The Indictment charges a violation of Section 152 of Title 18, United States Code, which provides in pertinent part:

“Whoever knowingly and fraudulently conceals from the receiver . . . or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

“Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

“Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; . . .

“Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

IV.

Statement of Facts.

In November of 1957 James Scribner and Eugene Butler formed and operated the corporation known as San Fernando Valley Wholesale Food Distributors, Inc. [R. T. 306, 321.]² The combined original investment of Eugene Butler and James Scribner was under \$1,000. [R. T. 306, 321, 322.] That stock was owned 50% by Eugene Butler and 50% by Louise Scribner.

²R.T. refers to Reporter's Transcript of Record.

Louise Scribner did no work in the management of this company or any of the other Butler-Scribner corporations; played no part in making policy and actually only held the stock for her husband, James Scribner. [R. T. 306, 307, 321, 322, 527, 528.]

San Fernando Valley Wholesale Food Distributors, Inc. was a franchised freezer dealer for Orange County Wholesale Food Distributors from approximately November 1957 until San Fernando Valley Wholesale Food Distributors' filed a voluntary petition in bankruptcy on September 17, 1959. San Fernando Valley Wholesale Food Distributors sold freezers on conditional sales contracts and Orange County Wholesale Food Distributors arranged for financing the contracts at lending institutions. These leading institutions would purchase the contracts at a discount and either sent the full payment to Orange County Wholesale Food Distributors, who in turn paid a commission to its dealer San Fernando Valley Wholesale Food Distributors, or the finance company would send San Fernando Valley Wholesale Food Distributors its commission payment and the cost of the freezer was sent to Orange County Wholesale Food Distributors. [R. T. 129, 130, 193, 261.]

San Fernando Wholesale Food Distributors experienced a slump in sales approximately the first part of 1959. In addition to their decrease in sales volume, San Fernando Valley Wholesale Food Distributors' expenses were increased due to their moving into more expensive quarters. San Fernando Valley Wholesale Food Distributors financial problems continued from early 1959; the company constantly being short of funds until the filing of their petition in bankruptcy September 17, 1959. [R. T. 323, 617.]

During the spring and summer of 1959, at a time when San Fernando Valley Wholesale Distributors' financial position was worsening, appellants Butler and Scribner formed certain corporations [R. T. 531], including: San Fernando Valley Locker Service, started in April of 1959 and used to supply San Fernando Valley Food Distributors' customers with meat; the locker service relying on San Fernando Valley Wholesale Food Distributors for well over 90% of their business. [R. T. 312, 313.] Ventura County Wholesale Food Distributors, formed in approximately July 1959 allegedly to sell freezers and food to customers in the Ventura County area [R. T. 405, 406], and Preferred Enterprises, formed during the summer of 1959 by appellants at a time when San Fernando Valley Wholesale Food Distributors' condition was "shaky" [R. T. 313, 314] purportedly to handle contracts San Fernando Valley Wholesale Food Distributors was having difficulty financing. [R. T. 314, 351, 534, 540.]

In late July or early August of 1959, San Fernando Valley Wholesale Food Distributors was unable to pay certain monies then owing. [R. T. 147, 268-270.] Eugene Butler asked Orange County Wholesale Food Distributors to sell San Fernando Valley Food Distributors \$10,000 worth of freezers on a cash basis in order that he could "keep the corporation afloat at least another six months so that they could get as much out as possible." In short, to permit James Scribner and Eugene Butler (in Butler's words) "to milk the corporation for all it was worth" and also see that Orange County Wholesale Food Distributors had their money returned to them. [R. T. 152, 273.] Orange County Wholesale Food Distributors refused to ship them

\$10,000 worth of freezers but did agree to ship San Fernando Valley Wholesale Food Distributors freezers C.O.D. on an individual basis as San Fernando Valley Wholesale Food Distributors entered into an actual contract with a prospective purchaser. [R. T. 150-151, 162.]

In August of 1959, the day following Butler's comments regarding "milking" San Fernando Valley Wholesale Food Distributors, there was another conference attended by James Scribner, Connell and Dick Hamilton, counsel for Orange County Wholesale Food Distributors. [R. T. 153, 270.] Attorney Hamilton advised Scribner that San Fernando Valley Wholesale Food Distributors should pay the money it owed to Orange County Wholesale Food Distributors since people "could go to jail for things like this." James Scribner said that he did not have any money for Orange County Wholesale Food Distributors but "if he ever had to go to jail his family wouldn't be affected, that his wife wouldn't have to baby-sit or anything", since he had certain money buried. [R. T. 154-155, 271-272.]

During the time period when appellant Butler had referred to the necessity of keeping San Fernando Valley Wholesale Food Distributors afloat to permit its "milking", Preferred Enterprises was formed and immediately (July and August of 1959) there was transferred to Preferred Enterprises over \$12,000 which originated in the sale by San Fernando Valley Wholesale Food Distributors of freezers and/or food contracts. These monies were derived when contracts were purchased by lending companies from San Fernando Valley Wholesale Food Distributors and checks in payment for

contracts purchased were issued payable to San Fernando Valley Wholesale Food Distributors. These checks were endorsed by San Fernando Valley Wholesale Food Distributors with a second endorsement of Preferred Enterprises, Inc., and were deposited to the bank account of Preferred Enterprises, Inc., at the Bank of Encino. [Exs. 1-A to 1-H; 1-P.] In addition, San Fernando Valley Wholesale Food Distributors made collections of some \$175 on a freezer and food contract sold to Dorothy Eagan, the payments from Mrs. Eagan being deposited to the bank account of Preferred Enterprises, Inc. [Exs. 8, 41, 42, 43, 44, 45, 46, 47, 48, 49.]

From these monies originating with San Fernando Valley Wholesale Food Distributors and subsequently transferred and deposited to the bank account of Preferred Enterprises, Inc., certain monies were transferred to the account of Taylor, Sherman and Heller.

On September 1, 1959, Preferred Enterprises drew a check against its bank account at the Bank of Encino, payable to Charles Taylor of Taylor, Sherman and Heller for \$10,000. [R. T. 335; Ex. 9.] The purpose shown is "Loan to San Fernando Wholesale Foods". [R. T. 335.] Preferred Enterprises, Inc., by letter dated September 1, 1959 [Ex. B] enclosed the cashier's check for \$10,000 to Charles B. Taylor. Preferred Enterprises' letter, among other things, instructed Taylor to issue a check to appellant Butler for \$4,050 and a check to Charles Scribner for \$2,500.

On September 1, 1959, a check was drawn on the Taylor, Sherman and Heller account to Eugene Butler for \$4,050. [Ex. 11; R. T. 337.] On September 9, 1959, a check was drawn on the account of Taylor, Sherman, and Heller to Eugene Butler for \$500. [Ex. 12; R. T. 337.]

The checks of Taylor, Sherman and Heller to Butler for \$4,050 and \$500 [Exs. 11, 12] and other checks issued by Taylor, Sherman and Heller [Exs. 13, 14, 15, 16, 17] were honored on September 10, 1959 to purchase a cashier's check for \$4,500 and a cashier's check for \$329.20 [Exs. 19, 20, 21], payable to Eugene Butler, issued by Citizens National Bank. The cashier's check for \$4,500 [Ex. 20] obtained by Eugene Butler on September 10, 1959, was used on November 2, 1959, to purchase 3 cashier's checks for \$1,000 each, one cashier's check for \$500 and \$1,000 in cash was obtained by Eugene Butler [Exs. 22, 23, 24, 25, 26; R. T. 339] at Bank of America, Sepulveda and Devonshire Branch. All cashier's checks [Exs. 23, 24, 25, 26] were payable to and negotiated by Eugene Butler [R. T. 339] and used for his personal expenses. [R. T. 323, 324.]

On September 1, 1959, pursuant to appellant's instructions a check No. 131 [Ex. 13] payable to Charles E. Scribner for \$2,520.42 was issued on the account of Taylor, Sherman and Heller, San Fernando account, by Charles B. Taylor. This check bears the endorsement of Charles B. Scribner with a second endorsement of James Scribner and was negotiated at Branch 386, of the Bank of America on September 3, 1959.

After deciding to place San Fernando Valley Wholesale Food Distributors in bankruptcy, appellants Butler and Scribner agreed to withdraw the remaining funds from the bank account of Preferred Enterprises, Inc.—some \$4,800—each man receiving \$2,400. In addition, they agreed that Eugene Butler would take over Preferred Enterprises, Inc., and that James Scribner would take charge of San Fernando Valley Wholesale Food

Distributors and Ventura County Wholesale Food Distributors [R. T. 315-319.] Pursuant to the arrangement between Eugene Butler and James Scribner, Butler on September 4, 1959, wrote a check for \$4,800 on the account of Preferred Enterprises, Inc., at the Bank of Encino. With this \$4,800 check he made application to the Bank of Encino for two cashier's checks. One was payable to James Scribner for \$2,400 and one was payable to Eugene Butler for \$2,400 [Exs. 9, 27, 28, 29.] Butler admitted he used his \$2,400 for personal expenses. [R. T. 323, 324.]

Butler and Scribner contend that Preferred Enterprises, Inc., purchased accounts receivable from San Fernando Valley Wholesale Food Distributors and that payment was made to San Fernando Valley Wholesale Food Distributors for the receivables purchased. The only funds available to Preferred Enterprises were "bonus" checks issued by San Fernando Valley Wholesale Food Distributors to Butler and Scribner in the amount of \$3,000 each and "loan repayment" checks issued by San Fernando Valley Wholesale Food Distributors to Butler and Scribner in the amount of \$1,400 each. These checks were endorsed by Butler and Scribner with a second endorsement of Preferred Enterprises, Inc., and a third endorsement of San Fernando Valley Wholesale Food Distributors. These checks were then deposited by San Fernando Valley Wholesale Food Distributors to its bank account. At the time these checks were issued no funds were on deposit in the account of San Fernando Valley Wholesale Food Distributors to cover the checks. No funds were received from Preferred Enterprises, Inc., by San Fernando Valley Wholesale Food Distributors. In effect what occurred

was that \$8,800 in checks were written on San Fernando Valley Wholesale Distributors account by appellants Butler and Scribner, there being no money in San Fernando Valley Wholesale Distributors' account to cover these checks. [R. T. 640.] Then Butler and Scribner endorsed the checks to Preferred Enterprises. The checks were not deposited to Preferred Enterprises' account but were merely endorsed back to the same account—San Fernando Valley Wholesale Food Distributors—they were originally issued on [R. T. 604, 624, 525.] In return for this transaction where no funds of any kind moved, appellants transferred to Preferred Enterprises some \$12,000 obtained when San Fernando Valley Wholesale Food Distributors sold contracts to finance companies covering freezer sales made by San Fernando Valley Wholesale Food Distributors prior to bankruptcy.

As previously indicated Ventura County Wholesale Food Distributors was formed some two to three months prior to the time appellants filed San Fernando Valley Wholesale Food Distributors' voluntary petition in bankruptcy. The corporation was purportedly formed to permit the sale of freezers in the Ventura County area. However, the record indicates that prior to Ventura County Wholesale Food Distributors formation, San Fernando Valley Wholesale Food Distributors was selling freezers in the Ventura County area as well as in the San Fernando Valley area and had Orange County Wholesale Food Distributors' permission to make such sales. [R. T. 521.] In fact, as appellant Butler stated "we made sales any place we could make them . . . regardless of area." [R. T. 521.] All freezers Ventura County Wholesale Food Distributors had any

contact with went from Orange County Wholesale Food Distributors to San Fernando Valley Wholesale Food Distributors, all financing arrangements handled pursuant to an agreement between San Fernando Wholesale Food Distributors, Orange County Wholesale Food Distributors and the finance company. [R. T. 525.] Orange County Wholesale Food Distributors was subject to recourse on these agreements with the finance company in case of a repossession and San Fernando Valley Wholesale Food Distributors was also subject to necessity of making certain payments in case there was a repossession on one of their freezers. [R. T. 526.] In addition, Ventura County Wholesale Food Distributors did not have any facilities to store freezers. [R. T. 524.] While San Fernando Valley Wholesale Food Distributors obtained a franchise agreement from Orange County Wholesale Food Distributors to permit its freezer sales, Ventura County Wholesale Food Distributors never obtained any franchise agreement from Orange County. [R. T. 535-536, 646.]

San Fernando Valley Wholesale Food Distributors sold four contracts covering freezer sales to Public Finance Corporation. Public Finance checks dated September 8, and September 14, 1959 and totalling \$649.60 were issued payable to San Fernando Valley Wholesale Food Distributors [Ex. 1-Q, 1-R.] These checks were endorsed "pay to the order of Ventura County Wholesale Food, J. Scribner", [Ex. 1-Q, 1-R.]

On Labor Day of 1959 a meeting was held in the law offices of Taylor, Sherman and Heller. Present were Taylor, James Scribner, Eugene Butler, Connell, Jarman, Hamilton (counsel for Orange County Wholesale Food

Distributors) and Mr. Borak (a member of the accounting firm that examined the books of San Fernando Valley Wholesale Food Distributors) [R. T. 155, 274.] The purpose of the meeting was to determine whether San Fernando Valley Wholesale Food Distributors could stay in business. James Scribner and Eugene Butler maintained that they could make a go of the business and the representatives of Orange County Wholesale Food Distributors went along with them [R. T. 156.] An arrangement was made whereby when San Fernando Valley Wholesale Food Distributors made a sale, Orange County Wholesale Food Distributors would send them part of their commission and send another part to a Mr. Taylor, who would create a fund to be used in settling with any creditors who were pressing San Fernando Valley Wholesale Food Distributors [R. T. 156, 274.]

Orange County Wholesale Food Distributors was anxious to keep San Fernando Valley Wholesale Food Distributors in business and offered to be San Fernando Valley Wholesale Food Distributors' last creditor to be satisfied since if San Fernando Valley Wholesale Food Distributors went out of business, Orange County Wholesale Food Distributors had outstanding a million dollars worth of paper for which they would be responsible. [R. T. 156, 274.]

The day before appellants Butler and Scribner voluntarily placed San Fernando Valley Wholesale Food Distributors in bankruptcy James Scribner sold a 1959 Thunderbird owned by San Fernando Valley Wholesale Food Distributors. The balance owed on this car was paid off by the purchasers. San Fernando Valley Wholesale Food Distributors' equity in this car, some

\$900, was paid to James Scribner in cash. [R. T. 63, 64, 66, 70, 71, 72, 319, 320.]

San Fernando Valley Wholesale Food Distributors filed a voluntary petition in bankruptcy on September 17, 1959 [Ex. 2; R. T. 9, 160.] On September 17, 1959, an order for appointment of Receiver George Gardner was filed [Ex. 3; R. T. 10] and on September 18th the receiver's bond was approved [Ex. 4; R. T. 10.] San Fernando Valley Wholesale Food Distributors was adjudicated a bankrupt on September 23, 1959 [Ex. 7; R. T. 12.] On approximately September 24, 1959, Orange County Wholesale Food Distributors posted a \$10,000 bond with the bankruptcy court and took over the business formerly run by San Fernando Valley Wholesale Food Distributors.

Orange County Wholesale Food Distributors issued a check dated September 14, 1959 payable to San Fernando Valley Wholesale Food Distributors for commissions on two freezers sold by San Fernando Valley Wholesale Food Distributors [Ex. 96; R. T. 165, 166.] The check was endorsed San Fernando Wholesale Food Distributors, San Fernando Valley Locker Service, then by James Scribner [Ex. 96: R. T. 165.]

On September 18, 1959, the day following the filing of the voluntary petition in bankruptcy by San Fernando Valley Wholesale Distributors, James Scribner asked Jarman to make checks for the sales by San Fernando Valley Wholesale Food Distributors on Orange County Wholesale Food Distributors freezers payable to him and not to make the checks out to San Fernando Valley Wholesale Food Distributors. James Scribner stated he did not want the money to "get involved in the bankruptcy so he could have the money."

James Scribner stated that if Orange County Wholesale Food Distributors made the checks payable to San Fernando Valley Wholesale Food Distributors, he could not get the money. [R. T. 164, 220-221.]

Pursuant to Scribner's instructions to Jarman, Orange County Wholesale Food Distributors checks for \$847.18 [Ex. 92], \$1,123.70 [Ex. 79], \$485.60 [Ex. 80] were issued by Orange County Wholesale Food Distributors payable to James Scribner for sales of freezers made by San Fernando Valley Wholesale Food Distributors before San Fernando Valley Wholesale Food Distributors went into bankruptcy and after it had obtained an actual contract between itself and the prospective customer. [Exs. 79, 80, 92; R. T. 162, 163.] Delivery of the freezers by Orange County Wholesale Food Distributors was not made until a contract of sale was obtained by San Fernando Valley Wholesale Food Distributors from the prospective customers. [R. T. 162, 163.]

On September 18, 1959, Jack Jarman issued check No. 11431 for \$847.18 on the account of Orange County Wholesale Food Distributors. [Ex. 92.] This check is endorsed "James Scribner, S. F. Locker Service James Scribner" and was negotiated at Branch 386 of the Bank of America on September 21, 1959. Orange County Wholesale Food Distributors check [Ex. 92] was to pay commissions due San Fernando Valley Wholesale Food Distributors for freezers sold by San Fernando Valley Wholesale Food Distributors on which contracts had been sold and payment made by finance companies to Orange County Wholesale Food Distributors by checks dated September 18, 1959. [Exs. 93, 94.]

Commissions due San Fernando Valley Wholesale Food Distributors on these sales all made prior to bankruptcy were computed by Jarman as \$847.18. [Ex. 95.] The following deliveries all prior to bankruptcy, were made by Orange County Wholesale Food Distributors of freezers sold by San Fernando Valley Wholesale Food Distributors on which commissions were paid to James Scribner by check of Orange County Wholesale Food Distributors for \$847.18 [Ex. 92] as follows:

Roth on Sept. 15, 1959, #267313. [Ex. 99.]

Glen on Sept. 17, 1959, #265547. [Ex. 107.]

Ortiz on Sept. 15, 1959, #265388. [Ex. 99.]

Pittman on March 8, 1959, #83660. [Ex. 110.]

Katz on August 18, 1959, #251865. [Ex. 101.]

Jackson on Sept. 15, 1959, #270326. [Ex. 99.]

Omon on Sept. 17, 1959, #270286. [Ex. 107.]

On September 25, 1959, Orange County Wholesale Food Distributors issued check #11437 payable to James Scribner for \$1,123.70. [Ex. 79.] This check is endorsed "James Scribner pay to San Fernando Valley Locker Service James Scribner". It was negotiated at Branch 386 of the Bank of America on September 25, 1959. It was in payment of freezers sold by San Fernando Valley Wholesale Food Distributors [Exs. 89, 90] prior to bankruptcy.

On contracts sold by San Fernando Valley Wholesale Food Distributors on which Orange County Wholesale Food Distributors paid commissions to James Scribner by check for \$1,123.70 dated September 25, 1959 [Ex.

79] deliveries by Orange County Wholesale Food Distributors all prior to bankruptcy, were as follows:

Revitto on Sept. 17, 1959, #88267. [Ex. 107.]

Lindeman on Sept. 17, 1959, #88228. [Ex. 107.]

Ruggier on Sept. 17, 1959, #267069. [Ex. 107.]

Ward on July 28, 1959, #266520. [Ex. 109.]

Salinas on Sept. 17, 1959, #88188. [Ex. 107.]

On September 30, 1959, Orange County Wholesale Food Distributors issued check No. 11473, payable to James Scribner for \$485.60. [Ex. 80.] This check is endorsed "James Scribner San Fernando Valley Locker Service James Scribner". It was negotiated at Branch 386 of Bank of America on September 30, 1959. It was in payment of commissions on freezers sold by San Fernando Valley Wholesale Food Distributors. It was in payment of last sales made prior to Orange County Wholesale Food Distributors coming in after bankruptcy. [Ex. 91.]

On contracts sold by San Fernando Valley Wholesale Food Distributors on which Orange County Wholesale Food Distributors paid commissions to James Scribner by check for \$485.60 dated September 30, 1959 [Ex. 80] deliveries by Orange County Wholesale Food Distributors were as follows:

Labor on Sept. 23, 1959, #154125. [Ex. 104.]

Robinson on Sept. 28, 1959, #88307. [Ex. 102.]

The Robinson, referred to above, testified as a Government witness at the trial, establishing that his contract with San Fernando Valley Wholesale Food Distributors was not only dated September 15, 1959 [Ex. 62], but that his down payment was made by check dated September 15, 1959. [Ex. 61.]

The record also contains the testimony of certain Government witnesses who had entered into contractual relations with and supplied monies to San Fernando Valley Wholesale Food Distributors prior to bankruptcy. The record discloses after San Fernando Valley Wholesale Food Distributors filed their voluntary petition in bankruptcy on September 17, 1959, certain monies owing the bankrupt corporation were diverted to other corporations owned or controlled by appellants. The following summary of the testimony and exhibits of witnesses Eagan, Barry and Robinson are offered in this regard.

On April 4, 1959, Mrs. Dorothy Eagan and her husband Walter purchased a freezer and certain food from San Fernando Valley Wholesale Food Distributors. T purchase was by an order signed on April 4, 1959 with San Fernando Valley Wholesale Food Distributors. The order was signed by Mrs. Eagan, her husband, and a Gene T. Davidson, salesman for San Fernando Valley Wholesale Food Distributors. [Exs. 37, 40; R. T. 82-83.]

Mrs. Eagan obligated herself to make 24 monthly payments of \$28.32 for the freezer after a down payment of \$60.35. The order also provided for 6 monthly food payments of \$36.64, thereby making the Eagan's monthly payments \$64.99. [R. T. 83.] Mrs. Eagan's down payment of \$60.35 was made by means of a promissory note dated April 4, 1959 to San Fernando Valley Wholesale Food Distributors and signed by her husband and herself. [Ex. 40.]

On May 13, 1959 San Fernando Valley Wholesale Food Distributors acknowledged receipt from her of the down payment in the amount of \$60.35. The down payment was made by postal money order purchased

by Mrs. Eagan on May 9, 1959 in the amount of \$60.35 by which she paid the above mentioned promissory note. [Exs. 39; 39A.] The receipt of Mrs. Eagan's food and freezer payments of \$36.67 and \$28.32 respectively received by San Fernando Valley Wholesale Food Distributors on June 24, 1959 was acknowledged by San Fernando Valley Wholesale Food Distributors in a letter signed by Eugene Butler dated July 11, 1959. [Exs. 41, 42, 43.] The receipt of Mrs. Eagan's food payment of \$366.67 and freezer payment of \$28.32 [U. S. postal money order 12-78,754,886 in the amount of \$64.99—Govt. Ex. 44] received by San Fernando Valley Wholesale Food Distributors on July 22, 1959 was acknowledged by San Fernando Valley Wholesale Food Distributors in a letter dated July 30, 1959, signed by Eugene Butler. [Ex. 45.]

The receipt of Mrs. Eagan's food payment of \$36.67 and freezer payment of \$28.32 [3 money orders \$36.67, \$10.00 and \$18.32 respectively—Govt. Exs. 46; 47; 48] was acknowledged by San Fernando Valley Wholesale Food Distributors in a letter dated August 20, 1959 signed by Eugene Butler. [Ex. 49.]

After bankruptcy James Scribner wrote Mrs. Eagan a letter [Govt. Ex. 54—envelope postmarked November 2, 1959; Ex. 60] requesting her to send her payments in the future to Ventura County Wholesale Food Distributors, 263 Wagon Wheel Road, Oxnard, California, and also informing her that the necessary payment books to bring her records current would be forwarded. [Ex. 55.] On approximately December 14, 1959 Mrs. Eagan received an envelope bearing the return address of Ventura County Wholesale Food Distributors, Box 203, Oxnard, California. The envelope

contained a payment book reflecting that 30 payments at \$28.32 with the terms under this account. The book is dated December 14, 1959 and contains the notation 7 payments made to date, balance due 23 payments, food paid in full. [Ex. 58.]

Mrs. Eagan produced stubs covering payments she made per James Scribner's instructions to Ventura County Wholesale Food Distributors, the food and freezer contract she had entered into previously with San Fernando Valley Wholesale Food Distributors. Mrs. Eagan produced stubs covering payments made by her on the food and freezer contracts as follows: No. 12-1624,361 in the amount of \$64.99 purchased on October 7, 1959. [Ex. 50.] 12-1625,814 in the amount of \$64.99 purchased by her on November 9, 1959. [Ex. 51.] No. 12-4,006,640 in the amount of \$64.99 purchased November 20, 1959. [Ex. 52.] No. 12-3,962,309 in the amount of \$28.32 purchased December 5, 1959. [Ex. 53.]

In addition Mrs. Eagan on February 23, 1960, sent Ventura County Wholesale Food Distributors, 263 Wagon Wheel Road, Oxnard, Box 203 an envelope covering a freezer payment which envelope was returned to her stamped with the notation "Moved—left no address." [Ex. 59.]

On September 15, 1959, Donald Robinson entered an order with San Fernando Valley Wholesale Food Distributors for the purchase of a freezer. Robinson's contract with San Fernando Valley Food Distributors called for a down payment of \$25 and 36 monthly payments at \$22.93 each. In addition to the \$22.93 in monthly payments the order provides that food payments not to exceed \$44 were to be made monthly for a

total monthly payment of \$66.93. The order is signed by Donald Robinson and Barbara J. Robinson and Irwin Ellis, salesman for San Fernando Valley Wholesale Food Distributors. [Ex. 62.] On September 15, 1959, Barbara Robinson drew a check on her account at the Bank of America payable to San Fernando Valley Wholesale Food Distributors in the amount of \$25 and handed the check to Ellis, San Fernando Valley Wholesale Food Distributors salesman. [Ex. 61.] The check bears the endorsement of San Fernando Valley Wholesale Food Distributors with the second endorsement of James Scribner and a third endorsement San Fernando Valley Locker Service by Louise Scribner. The check was deposited on December 17, 1959, Branch 386 Bank of America.

On May 1, 1959, Doreen N. Barry and her husband purchased a freezer from San Fernando Valley Wholesale Food Distributors. The Barrys' obligated themselves to make a cash down payment of \$60.35 of which \$1.35 had been paid as well as obligated themselves to make 30 monthly freezer payments in the amount of \$23.40 each. In addition the Barrys' agreed to make food payments not to exceed 6 months duration of \$44.00 per month. [Govt. Ex. 63; R. T. 110.] Mrs. Barry hand carried food and freezer payments to San Fernando Valley Wholesale Food Distributor office, upstairs on Friar Street in Van Nuys on approximately May 29, 1959, in the amount of \$67.40; on June 26 in the amount of \$67.40; on July 24 in the amount

of \$67.40. San Fernando Valley Wholesale Food Distributors furnished Mrs. Barry with receipts for these payments. [Exs. 65, 66, 67.] In addition on September 13, 1959 Mrs. Barry received a receipt from San Fernando Valley Wholesale Food Distributors acknowledging Mrs. Barry's payment of \$67.40 for payment of freezer and food; the receipt containing the initials G.B. [Exs. 68, 71.] On October 2, 1959 Mrs. Barry continued to make her payments to the same geographical location however her October payment for \$67.40 for the food and freezer purchased from San Fernando Valley Wholesale Food Distributors was acknowledged by a receipt signed by Gold Shield Service by Jeannie Smith. [Ex. 69.] On October 20, 1959, Mrs. Barry received a receipt for freezer payment in the amount of \$23.40, receipt signed by Jeannie Smith. [Ex. 70.] On November 30, 1959, Mrs. Barry made her November freezer payment of \$23.40 by a personal money order dated that day, the payee of which was James Scribner. [Exs. 72; 75, 76.]

On January 12, 1960, Barry sent a check in the amount of \$23.40 by handy mailing check to Scribner [Ex. 74] covering the payment by him on the freezer he purchased from San Fernando Valley Wholesale Food Distributors.

Barry's payments for freezer were made to Scribner at his home in Sherman Oaks at Scribner's request. [R. T. 112, 113.]

V.

ARGUMENT.

A. This Court Has No Jurisdiction to Review the District Court's Order Denying Motion for New Trial Since Appellants Did Not File a Notice of Appeal as Required by the Federal Rules of Criminal Procedure.

On March 1, 1962, approximately one year after filing a notice of appeal from the judgment of conviction, appellants filed a motion for new trial based on newly discovered evidence. On April 16, 1962, the trial judge denied their motion for new trial. Appellants did not take an appeal from the order denying the motion for new trial. Appellants are now attempting to obtain a review of the April 16, 1962 order denying their motion for new trial based on the notice of appeal from the judgment of conviction filed on May 8, 1961.

Filing of a notice of appeal is required by Rule 37 of the Federal Rules of Criminal Procedure, Title 18, United States Code and is mandatory and jurisdictional.

Brant v. United States, 210 F. 2d 470 (5th Cir. 1954);

United States v. Robinson, 361 U. S. 220 (1960);

Crow v. United States, 203 F. 2d 670 (9th Cir. 1953);

Huff v. United States, 192 F. 2d 911 (5th Cir. 1951), cert. den. 62 S. Ct. 560;

United States v. Bloom, 164 F. 2d 556 (2nd Cir. 1947), cert. den. 68 S. Ct. 726.

Therefore, this Court is without jurisdiction to review the District Court order denying the motion for new trial.

B. The Trial Court Did Not Abuse Its Discretion in Denying the Motion for New Trial.

Assuming for the purposes of this argument that the defendants' motion for new trial may properly be heard at this time, this court can reach no decision other than that the trial court did not abuse its discretion in denying the motion for new trial.

The requirements for a motion for new trial based on newly discovered evidence have been clearly established in this Circuit and are as follows:

1. The evidence must be newly discovered after trial;
2. The defendant must show that there has been due diligence on his part;
3. The evidence must be more than merely cumulative or impeaching;
4. The evidence must be material to the issue;
5. The evidence must be such as would probably produce an acquittal.

Gallegos, et al. v. United States, 295 F. 2d 879 (9th Cir. 1961);

Pitts v. United States, 263 F. 2d 808 (9th Cir. 1959), cert. den. 360 U. S. 919;

Brandon v. United States, 190 F. 2d 175 (9th Cir. 1951);

Wagner v. United States, 118 F. 2d 801 (9th Cir. 1941).

A motion for new trial based on newly discovered evidence is addressed to the sound discretion of the trial judge. *Adams v. United States*, 191 F. 2d 206 (9th Cir. 1951); *Casey v. United States*, 20 F. 2d 752 (9th

Cir. 1927). The trial judge in determining the impact of newly discovered evidence may “utilize the knowledge he gained from presiding at the trial as well as the showing on the motion.” *United States v. On Lee*, 201 F. 2d 722, 723 (2nd Cir. 1953), cert. den. 345 U. S. 936. Therefore, it is clear that this Court, only having an opportunity to review the cold record, should be very hesitant to reverse the learned trial judge who had an opportunity to hear the testimony, scrutinize the witnesses, and note their demeanor and behavior on the witness stand.

A review of the appellants’ motion for new trial clearly shows that the “evidence” is not sufficient to grant a new trial.

Aside from the appellants’ bald statement, they do not present any facts to indicate that this evidence was newly discovered *after trial* [emphasis added]. Further the appellants make no showing of due diligence on their part.

The appellants were fully apprised of the items of property covered by the allegations of the defendant. The appellants do not claim surprise that Mr. Jarman and Mr. Connell testified as witnesses on behalf of the Government, appellants merely claim that they were surprised at the substance of the testimony. But then, of course, probably every defendant in every criminal case could claim surprise at the substance of the testimony presented by the Government when it is discovered that witnesses are willing to relate the criminal transactions of the defendant.

Appellants offer eight affidavits which they assert are “newly discovered.” [C. T. 139-142.] Appellant’s claim is clearly controverted by the facts. Four of the

affiants were defense witnesses in the trial of this case. [R. T. 566, 576, 582, 585.] The remaining affidavits show that each affiant was well acquainted with the appellants prior to the time of trial. Clearly their testimony was certainly accessible to the appellants prior to and during the trial.

On the basis of the above, the Government would submit that appellants' affidavits are not "newly discovered evidence" and further that appellants made no showing of due diligence to explain why the individuals themselves, who submitted affidavits only after the jury had found appellants guilty as charged, could not have been presented as witnesses at the time of trial.

Regardless of the fact that appellants have not submitted "newly discovered evidence" or show due diligence, the appellants' affidavits at most are merely cumulative or impeaching and therefore also not reasons for the granting of a new trial.

The allegations contained in the affidavit offer to support the motion for new trial, substantially parallel to the testimony of each of the appellants given at the time of this case. Thus, the only relevance of this "newly discovered evidence" is to corroborate the testimony offered by each of the appellants and in the second instance to impeach the testimony offered by two of the government's witnesses. In *Balestreri v. United States*, 224 F. 2d 915 (9th Cir. 1955), the defendant moved for a new trial on the basis of newly discovered evidence which indicated that the testimony of the government's sole witness had been induced by threats, promises and favors. This court held that such evidence was merely impeaching and not sufficient reason to grant a new trial.

In *Daniel Roy Perez v. United States*, 297 F. 2d 649 (9th Cir. 1961), this court held that the proposed new evidence offered on defendant's motion for new trial was an attempt to impeach the government's identifying witness and since the value of this new evidence was solely for impeachment, it was not a sufficient reason to grant a new trial.

The appellee would, therefore, submit that since the newly discovered evidence offered by appellant is merely an attempt to show the falsity of testimony given by government witnesses and to corroborate the testimony given by the appellants at the trial of this case, such evidence is merely cumulative and impeaching and not a sufficient reason to grant a new trial. *Pitts v. United States, supra*; *Morgan v. United States*, 301 F. 2d 272 (9th Cir. 1962).

In addition to the above arguments, it should be noted that appellants only seek to impeach the testimony of two of some thirteen Government witnesses called at the trial. The testimony of the two witnesses did not bear in any way on San Fernando Wholesale Foods' transfer of thousands of dollars to Preferred Enterprises immediately prior to bankruptcy in what the jury undoubtedly believed was a fictitious transaction designed as a vehicle to get money from San Fernando into the pockets of appellants. Therefore it is respectfully submitted that the affidavits offered by appellants are not "new evidence" which would produce a different result in a new trial. *Bisno v. United States*, 299 F. 2d 711 (9th Cir. 1961); *Edwards v. United States*, 265 F. 2d 302 (9th Cir. 1959).

C. The Evidence Is Sufficient to Sustain the Jury's Finding That Appellants Were Guilty as Charged in the Indictment.

The Government respectfully submits that the evidence is sufficient to sustain the jury's verdict. Especially is this true when this Court as it must consider the evidence and inferences that can be drawn from it most favorably to the Government.

Glasser v. United States, 315 U. S. 60 (1941);
Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956);
Robinson v. United States, 26 F. 2d 645 (9th Cir. 1959);
Young v. United States, 298 F. 2d 108 (9th Cir. 1962);
Benchwick v. United States, 297 F. 2d 330 (9th Cir. 1961).

The Government will not dwell on the fact that this Court is loath to substitute its judgment for that of the trier of fact in resolving facts which are in dispute. It is felt sufficient to indicate that the credibility of witnesses and the weight to attach to their testimony is certainly a matter within the province of the trial court who has had the opportunity to see and hear the witnesses.

Stopelli v. United States, 183 F. 2d 391 (9th Cir. 1950);
Norfolk v. McKenzie, 116 F. 2d 632 (6th Cir. 1941).

Appellee submits that the evidence as indicated in the Statement of Facts clearly indicates that the evidence presented was sufficient to sustain the jury's verdict.

D. The Court Did Not Deny Appellants Due Process by Trying the Case Expeditiously.

Appellants contend that the rapidity and length of the trial days prejudiced them so as to deny them due process. In the five day trial of this case it is to be noted that there is only one trial date that ran into the evening hours. On April 27, 1961, the trial day commenced at 9:15 A.M. and continued to 10:05 P.M. [C. T. 98.] It is to be noted that during the April 27, 1961 trial date, the court afforded approximately six hours total in recesses.

Appellee would submit that this argument is spurious. Courts do not deny due process just because they act expeditiously. The law's delay is the lament of society. A reading of the minutes of each trial day reveals that the appellants are attempting to conjure up an error. [C. T. 77-104.]

In *United States v. Nierstheimer*, 166 F. 2d 87 (7th Cir. 1948), the appellant raised as error the rapidity of the trial. The facts involved were that the appellant was "indicted, counsel was appointed to defend him, he was arraigned, tried and convicted in a capital case all in one day." The Circuit held that such expeditiousness did not deny him due process.

VI.

Conclusion.

On the basis of the above recited facts, it is respectfully submitted that the trial court did not abuse its discretion in not granting appellants' motion for a judgment of acquittal after the return of the jury's verdict and in denying appellants' motion for a new trial.

Respectfully submitted,

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No. 17417

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE OLIVER BUTLER and JAMES G. SCRIBNER,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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